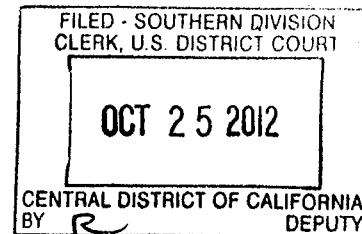


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2 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY *Petitioner*  
3 FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL  
4 (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF  
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6 DATED: 10-25-12  
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8 DEPUTY CLERK



15 UNITED STATES DISTRICT COURT  
16  
17 CENTRAL DISTRICT OF CALIFORNIA

18 ELEOBARDO LOPEZ, ) Case No. CV 11-2152-JVS (JPR)  
19 Petitioner, )  
20 vs. ) ORDER ACCEPTING FINDINGS AND  
21 W.J. SULLIVAN, Warden, ) RECOMMENDATIONS OF U.S.  
22 Respondent. ) MAGISTRATE JUDGE

23 Pursuant to 28 U.S.C. § 636, the Court has reviewed de novo  
24 the Petition, records on file, Report and Recommendation of the  
25 U.S. Magistrate Judge ("R&R"), and Petitioner's various post-R&R  
26 motions. On September 24, 2012, Petitioner filed Objections to  
27 the R&R, in which he objects not only to the R&R but also the  
28 Magistrate Judge's June 25, 2012 Order denying his motions to  
expand the record and strike the traverse.

29 I. Objections to the June 25, 2012 Order

30 Acknowledging that Cullen v. Pinholster, 563 U.S. \_\_\_, 131  
31 S. Ct. 1388, 1398, 1401, 179 L. Ed. 2d 557 (2011), limits review  
32 under 28 U.S.C. § 2254(d)(1) to "the record that was before the  
33 state court that adjudicated the claim[s] on the merits,"  
34 Petitioner nonetheless contends that the Magistrate Judge erred  
35 in denying his motion to expand the record with his codefendant

1 Alfredo Rivera, Jr.'s trial transcripts because they were in fact  
2 part of the state-court record. (Objections at 6-11.)  
3 Petitioner explains that he "emphatically informed" the state  
4 courts on habeas that "it was absolutely necessary to review"  
5 those transcripts in addressing all of his ineffective-  
6 assistance-of-counsel claims. (Id. at 6.) He further argues  
7 that given California appellate courts' inherent authority to  
8 take judicial notice of any record and their "well followed"  
9 practice of reviewing *sua sponte* the pertinent trial record  
10 without requiring a petitioner to submit the transcripts, the  
11 "only logical conclusion" is that the state courts independently  
12 supplemented his record with Rivera's transcripts and considered  
13 them before denying his claims. (Id. at 6-10.)

14 The Court concurs with the reasoning of the Magistrate  
15 Judge's June 25, 2012 Order denying Petitioner's motion to expand  
16 the record. Petitioner's arguments lack legal support because in  
17 California, the "general rule" is that "an appellate court should  
18 not take [judicial] notice of matters not first presented to and  
19 considered by the trial court, where to do so would unfairly  
20 permit one side to press an issue or theory on appeal that was  
21 not raised below." People v. Sakarias, 22 Cal. 4th 596, 636-37,  
22 94 Cal. Rptr. 2d 17, 44 (2000) (internal quotation marks omitted)  
23 (declining to expand record to include codefendant's trial  
24 transcripts in support of claim that prosecutor presented  
25 inconsistent theories at separate trials).<sup>1</sup> Thus, while a state

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26  
27 <sup>1</sup> Petitioner cites Sakarias for the proposition that  
28 California courts may take judicial notice of any state-court  
record pursuant to California Evidence Code sections 452 and 459  
(Objections at 9), but he omits Sakarias's holding in the

1 court on habeas typically takes "judicial notice of its own  
2 records and of the prior petitions filed by . . . a petitioner,"  
3 In re Clark, 5 Cal. 4th 750, 798 n.35, 21 Cal. Rptr. 2d 509, 541  
4 n.35 (1993), it is speculative and far from "logical" to assume  
5 that the state courts here considered Rivera's transcripts,  
6 particularly when Petitioner never expressly asked the state  
7 courts to do so. Instead, he merely (1) asserted that he was in  
8 the process of obtaining them and would then incorporate them  
9 into his arguments, (2) requested an evidentiary hearing, and (3)  
10 sought Rivera's transcripts directly from the state courts.

11 (See, e.g., Lodgment 13, Attach. at unnumbered 1-2; Mem. P. & A.  
12 at 13-14.)

13 Moreover, the state courts likely did not consider Rivera's  
14 transcripts because contrary to Petitioner's contention, they  
15 were not "necessary" to adjudicate his claims. Petitioner relies  
16 on Rivera's proceedings in asserting two related claims in the  
17 Petition: his trial counsel was ineffective for failing to  
18 (1) remind the trial court that it had previously acquitted  
19 Rivera of the kidnapping-for-robbery counts in a bench trial  
20 (claim I(B)) and (2) object to the prosecutor's misconduct in  
21 charging Petitioner with more serious counts compared to Rivera

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28 subsequent paragraph declining to do so in circumstances similar  
to those here.

1 (claim I(C)).<sup>2</sup> (Pet. at 29-32.)<sup>3</sup> In support of those claims in  
2 state court, Petitioner attached several of Rivera's minute and  
3 sentencing orders, showing that (1) Rivera was originally charged  
4 with 11 counts of kidnapping for robbery and 16 counts of  
5 robbery; (2) the prosecutor subsequently amended the information  
6 to charge 11 counts of kidnapping for robbery, 7 counts of  
7 attempted robbery, and 9 counts of robbery; (3) Rivera was  
8 convicted of 7 counts of attempted robbery and 7 counts of  
9 robbery and was sentenced to 28 years 8 months in prison; and (4)  
10 the court of appeal reversed Rivera's convictions on one of the  
11 attempted-robbery counts, but his sentence remained unchanged.

12 (See Lodgment 13, Ex. D.) Because Petitioner provided a  
13 sufficient factual basis to adjudicate claims I(B) and I(C), the  
14 state courts presumably did not need Rivera's trial transcripts  
15 in denying those claims. In fact, the state courts presumably  
16 did not need any of Rivera's record because Petitioner's claims  
17 are legally baseless. See generally People v. Sparks, 48 Cal.  
18 4th 1, 5, 104 Cal. Rptr. 3d 764, 765 (2010) (holding that  
19 inconsistent verdicts are inevitable and courts should determine  
20 propriety of prosecution based on own record, not a different  
21 one); People v. Palmer, 24 Cal. 4th 856, 858, 103 Cal. Rptr. 2d  
22 13, 14 (2001) (holding that requirement of consistent verdicts in  
23

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24 <sup>2</sup> Claims I(E) (cumulative error) and I(F) (ineffective  
25 assistance of appellate counsel) indirectly require consideration  
26 of Rivera's proceedings as well; the Court omits discussion of  
them because they are premised on the success of claims I(B) and  
I(C).

27 <sup>3</sup> As in the R&R, in citing to the Petition the Court uses  
28 the pagination provided by the official CM/ECF electronic filing  
system.

1 separate criminal trials is "a vestige of the past with no  
2 continuing validity"); People v. Lucas, 12 Cal. 4th 415, 477, 48  
3 Cal. Rptr. 2d 525, 565 (1995) ("Prosecutors have broad discretion  
4 to decide whom to charge, and for what crime.").<sup>4</sup>

5 Because Pinholster forbids consideration of evidence outside  
6 the state-court record and no evidence exists that the state  
7 courts considered Rivera's transcripts in denying Petitioner's  
8 claims, the Magistrate Judge properly denied Petitioner's motion  
9 to expand the record as well as his request for an evidentiary  
10 hearing.<sup>5</sup>

11 II. Objections to the R&R

12 Petitioner premises most of his objections to the R&R on  
13 facts gleaned from Rivera's transcripts, which the Court cannot  
14 consider. (See Objections at 14-15, 20-21.) Decoupled from  
15 those impermissible contentions, Petitioner's Objections mostly  
16 simply reargue the Petition. (See generally id. at 13-22.) Like  
17 the Magistrate Judge, the Court cannot say that the state courts'  
18 analysis of the issues was objectively unreasonable.

19 Petitioner also asserts for the first time in these  
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21 <sup>4</sup> The Magistrate Judge cited those cases in the R&R.

22 <sup>5</sup> Petitioner also contends that the Magistrate Judge  
23 erred in denying his motion to strike the traverse because  
24 another inmate had filed three traverses in his name.  
25 (Objections at 11-13.) The Court concurs with the Magistrate  
26 Judge's June 25, 2012 Order and further notes that the issue is  
27 now moot because Petitioner has had the opportunity to file  
28 lengthy objections. In any event, as the Magistrate Judge noted  
in the Order, Petitioner received three extensions of time to  
file a traverse but elected to let the final deadline lapse on  
April 2, 2012, before the Magistrate Judge's filing of the R&R on  
April 11, 2012.

1 proceedings that the state courts erroneously found that one of  
 2 the victims, Jose Olmedo, was forced at gunpoint to drive a truck  
 3 that was parked outside the warehouse, a fact relied upon by the  
 4 trial court in denying Petitioner's motion for a new trial  
 5 challenging the asportation element of the kidnapping-for-robbery  
 6 charge. (Objections at 3-5.) Petitioner faults the Magistrate  
 7 Judge for "improperly fail[ing] to address th[at] unreasonable  
 8 determination of fact." (Id. at 3.) The Court disagrees.  
 9 Because Petitioner failed to raise that argument in the Petition  
 10 or anywhere in the state habeas proceedings, it is not properly  
 11 before the Court.<sup>6</sup> Cf. Delgadillo v. Woodford, 527 F.3d 919, 930  
 12 n.4 (9th Cir. 2008) (holding that reply is not proper pleading to  
 13 raise additional grounds for relief or amend petition). In any  
 14 event, the Magistrate Judge did not improperly adopt the state  
 15 courts' factual findings in the R&R because she expressly omitted  
 16 the paragraph detailing Olmedo's movements. (Compare R&R at 6  
 17 with Lodgment 6 at 3.)

18 In addition, Petitioner claims that the Magistrate Judge  
 19 engaged in "pure speculation" that counsel informed the trial  
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21 <sup>6</sup> Notably, Petitioner's sufficiency-of-the-evidence claim  
 22 on direct appeal, which he did not raise in the Petition,  
 23 conceded that Olmedo went outside the warehouse but argued that  
 24 that movement was merely incidental to the robbery. (Lodgment 3  
 25 at 13.) Olmedo testified that he ventured outside the warehouse  
 26 because he had to back the truck out of the dock "about 60, 70  
 27 feet" into the yard before reentering the warehouse with it.  
 28 (Lodgment 2, 1 Rep.'s Tr. at 117, 120-22.) Petitioner conceded  
 as much on direct appeal: "Olmedo briefly left the interior of  
 the warehouse to back up the truck and turn it around," which  
 "theoretically exposed [him] to the public during these few brief  
 and fleeting moments." (Lodgment 3 at 13.) The asportation  
 element of Petitioner's kidnapping-for-robbery conviction  
 therefore was met.

1 court of its prior acquittal of Rivera, in a bench trial, as to  
2 his kidnapping-for-robbery counts. (Objections at 17.)  
3 Petitioner claims that the trial court's statement, "I know you  
4 brought it to my attention what I did before" was directed to the  
5 prosecutor, not defense counsel. (Id.) The Court concurs with  
6 the Magistrate Judge's interpretation of the record, which is  
7 somewhat ambiguous. In any event, as the Magistrate Judge found,  
8 even if counsel failed to inform the court of its previous  
9 rulings in Rivera's trial, Petitioner could not show prejudice  
10 because inconsistent verdicts are "inevitable" in criminal  
11 proceedings (R&R at 18-19); further, because the same judge  
12 presided over both proceedings, the court likely did not need to  
13 be reminded of the outcome of Rivera's trial, which either the  
14 prosecutor or defense counsel mentioned nonetheless.

15 Having made a de novo determination of those portions of the  
16 Report and Recommendation to which Petitioner has filed  
17 Objections, the Court accepts the findings and recommendations of  
18 the Magistrate Judge.

19 IT THEREFORE IS ORDERED that (1) the Petition is denied  
20 without leave to amend and (2) Judgment be entered dismissing  
21 this action with prejudice.

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23 DATED: October 24, 2012

  
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JAMES V. SELNA  
U.S. DISTRICT JUDGE

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